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Hearing

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: LEHMAN BROTHERS
4 MORTGAGE-BACKED SECURITIES
5 LITIGATION,

09 MD 2017 (LAK)

08 CV 6762 (LAK)

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6 June 21, 2012

7 11:40 a.m.

8 Before:

9 HON. LEWIS A. KAPLAN,

10 District Judge

11 APPEARANCES

12 COHEN MILSTEIN SELLERS & TOLL P.L.L.C.

Attorneys for Plaintiffs

13 BY: STEVEN J. TOLL

RICHARD A. SPEIRS

14 CHRISTOPHER LOMETTI

15 WOLLMUTH MAHER & DEUTSCH LLP

Attorneys for Defendants

16 BY: MICHAEL C. LEDLEY

17 WOLF POPPER LLP

Attorneys for Mississippi Intervenor

18 BY: JAMES A. HARROD

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1 THE DEPUTY CLERK: All rise. Please be seated.

2 (Case called)

3 THE DEPUTY CLERK: Counsel for the lead plaintiffs,
4 are you ready?

5 MR. TOLL: Yes, Mr. Toll.

6 THE COURT: Okay, Mr. Toll, I'll hear you.

7 MR. TOLL: Good morning, your Honor.

8 Would you like me to go to the podium?

9 THE COURT: I'm more likely to hear you.

10 MR. TOLL: Thank you.

11 THE COURT: Your choice.

12 MR. TOLL: No, no. Either is fine. I think I'd like
13 you to hear me.

14 Your Honor, I'll address the approval of the
15 settlement first. Obviously, you're familiar with the prior
16 case and your ruling in the debt equity case, and of course the
17 stands for approval.

18 After your Honor's order here in March and the notice
19 order pursuant to the declaration of the affidavits submitted
20 from the administrator, notice was mailed out to over 5,000
21 class members in April, summary notice was published in the
22 Investors Business Daily, all of that is laid out in
23 Mr. Miller's declaration.

24 We're pleased to say, and this happens occasionally,
25 it's always a pleasant thing to happen when you have no

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1 objections to a settlement at all, or the fees for that matter
2 as well, fee request.

3 There were five exclusions originally. Then, as your
4 Honor knows from our supplemental submission, there was a sixth
5 which came in a day late. We have no objections to that being
6 considered. It appears it was sent out on time by overnight
7 mail. So there are now six exclusions to the class.

8 Your Honor, I don't want to go through it at length.
9 In our memo in support, it's addressed.

10 THE COURT: There isn't any need, really.

11 MR. TOLL: Okay.

12 THE COURT: There is a need, I think, on fees. For
13 better or for worse, I'm more parsimonious than the average
14 bear in these cases, and you know that, and at least I assume
15 you know that. And I kind of come into this with a lower
16 figure in mind, north of the lodestar, but not nearly as far
17 north as you would like to go. And I guess some of the things
18 that are going through my mind about it are these. The
19 recovery by individual class members is pretty much trivial,
20 right?

21 MR. TOLL: It's very small, your Honor.

22 THE COURT: All right. So, basically, what we have is
23 litigation that fundamentally benefits only the lawyers.

24 MR. TOLL: It's very small.

25 THE COURT: And I'm all for lawyers benefiting. You

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1 know, I was one for a long time, and I like to benefit from it.
2 But that's a fact.

3 Now, I don't think lawyers shouldn't benefit in these
4 cases by any means. You know, I've thought long and hard about
5 it. And I think there is a lot to be said for what the private
6 plaintiffs' bar does. For one thing, it's not subject to the
7 control of the Congressional appropriation process or political
8 wind blowing in Washington. It provides some deterrent, I
9 suppose, but I don't know how much. But I think there is a
10 balance to be struck. And I think a case like this also is a
11 pretty easy case. It's low hanging fruit.

12 And so I kind of come to the view that, yes, you did a
13 nice job. The D&O payment on the 2007, 2008 tower, that was
14 basically there for the asking. It was going to go to some
15 plaintiff's lawyer, you know, so you were fortunate enough to
16 get it.

17 Some extra points for getting into the next year. I
18 grant that. And remind me that the third piece came from?

19 MR. TOLL: The estate.

20 THE COURT: Which is a plus. I grant you the plus on
21 that. You did what needed to be done in the Bankruptcy Court
22 and you deserve credit for that.

23 Also a little bit on the other side. I kind of
24 thought that, as angry as everybody was, quite possibly
25 justifiably so at the ratings agencies, a lot of time, effort

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1 and money got spent on the rating agencies that was really not
2 well spent in my view. So even to give a lodestar is really to
3 give possibly more than would be appropriate if you viewed this
4 in terms of what would a private client think is a reasonable
5 fee -- which is offset somewhat by the fact that nobody
6 objects -- but that on a -- I'm just -- this is stream of
7 consciousness almost, but that the value of the failure of
8 objections on the fees is these people are getting next to
9 nothing anyway, so what difference does it make if they object
10 to the fees.

11 Okay. You now have the benefit of my ramblings on
12 this, and I'm happy to hear you, and maybe you'll move me one
13 way or the other.

14 MR. TOLL: Thank you, your Honor.

15 I'm happy to respond because, you know, I do think
16 it's a very reasonable request, and I'll explain and respond to
17 the thoughts you made.

18 Number one, and maybe the least important in some
19 sense is the lack of objections. While you may say it's not
20 that important, these -- you know, for the most part, they're
21 sophisticated class members. They know institutional money
22 managers, pension funds, and they have been fairly active in
23 opposing fees around the country in class actions. So the fact
24 that none of them felt 20 percent was unreasonable in a case
25 like this, knowing they're not getting big money back, is some

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1 testament I think in our favor -- again, not overwhelming, but
2 a point to be made.

3 THE COURT: What's the amount of the biggest recovery
4 by a class member that you anticipate here, in dollars?

5 MR. TOLL: Your Honor, it's actually -- here's the
6 reality, okay. The reality is it's going to be small no matter
7 what. Why? You know, and, as well as in the stock case in a
8 way, there were billions of dollars of losses. And at most
9 here there was a, you know, a couple hundred million dollars of
10 insurance money. Unlike the stock equity case, the debt equity
11 case, we don't have underwriters and other, you know, monies to
12 tap. So our sole source was the policies or the individuals,
13 these mid-level people that really didn't have anything.

14 So from the outset, once that happened it was clear
15 there's going to be a small recovery for people.

16 Now, the only thing I will say, and I don't know this
17 yet, is that the claims rate thus far would indicate the claims
18 are not going to be anywhere near what potential losses are.
19 And so instead of getting, you know, really whatever pennies or
20 some really low percentage, it may be somewhat higher than
21 that; you know, not on a high level obviously, but, you know,
22 instead of, you know, at 1 percent, maybe it's going to be five
23 or 10 percent or something. It's not clear yet. But the
24 damage, at least the claims thus far have come in, they're only
25 about \$150 million dollars. You know, there's another month

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1 and a half or so, so.

2 THE COURT: Do you have any feel for whether the
3 biggest check that gets written here to one entity is of the
4 order of \$100, \$1,000, 10,000, or 100,000 or a million?

5 MR. TOLL: I don't, your Honor, but I would think it
6 could be tens of thousands, could be 100,000 or more. If,
7 again, someone comes in with a \$10 million loss -- and the
8 claims just aren't that large, you know, they get 10 percent
9 and, you know, they -- I don't know. You could get some
10 substantial checks. It really depends on the claims. So that
11 is -- I don't think we'll be seeing, you know, pennies.
12 Because I think most of these people will have large losses who
13 filed, because again this class, our understanding, is composed
14 mostly of institutions and not individuals.

15 So, again, I think the fact that none of these
16 institutional investors has objected is a big positive, but
17 it's not the most important point.

18 Another point, your Honor, is again looking just at
19 some other cases. You know, the Wells Fargo case, it's the
20 closest in terms of number and so on. I'm only focusing now
21 for the mortgage-backed cases, case out in California and the
22 Judge there, Judge Lowe, I believe, gave 19.75 percent, and it
23 was a multiple of 2.8. And, you know, we thought about our
24 proposal what we came in at, and again our, the lead plaintiff
25 had approved 20 percent, and we decided just to come in lower

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1 thinking 19 and a quarter, something off the 20, whatever.

2 THE COURT: There's something of the character of
3 buying a rug to this.

4 MR. TOLL: Yeah, I suppose so.

5 But, in any event, looking at the Wells Fargo, and
6 then looking at the Merrill Lynch case here, your Honor -- now
7 again their percentage was slightly lower, 17 percent, and
8 that's out of this district. But, you know, it was a \$300
9 million settlement in the mortgage-backed case there. And,
10 again, at the end of the day the multiplier was 2.3. So we've
11 got two mortgage case, backed cases where lawyers are getting
12 2.3 and 2.8 -- unfortunately, we're not lead counsel in any of
13 those. But, you know, we thought coming in here at 2.01 was a
14 reasonable number.

15 You know, you make a valid point about the rating
16 agencies. I mean, obviously, that work is in our lodestar and
17 it didn't produce any money. And in some ways you could say,
18 okay, that means our multiplier, essentially, is more than
19 2.01. But, again, I don't -- you know, this was not a major
20 part of the effort. And so maybe our effective multiplier
21 under our 19 and a quarter percent is 2.5, but again, it's
22 still right in the range of what the two other judges did in
23 these mortgage-backed cases.

24 THE COURT: The lodestar was about three eight, right?

25 MR. TOLL: I'm sorry?

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1 THE COURT: Your loadstar was about three million
2 eight?

3 MR. TOLL: Yes, your Honor, 3.82.

4 THE COURT: I would imagine you didn't do the rating
5 agency part of this for less than somewhere between half
6 million and a million, right?

7 MR. TOLL: I'm purely guessing now, but I would guess
8 a half million, your Honor, but that's a guess. But, you know,
9 I don't think -- I mean, at the end of the day it was a brief
10 before your Honor, brief in the Second Circuit, obviously the
11 work on drafting and researching issues, but I'm guessing 500,
12 but I don't know.

13 The other thing you said about -- and, obviously, I
14 think two big pluses for us is getting money from the estate,
15 which is quite rare, and getting money from two insurance
16 policies, which Judge Lowe, Justice Lowe from California who is
17 kind of very knowledgable in the insurance world, which we are
18 not, you know, called it unprecedented in his opinion, to do
19 that. So, again, I think that is a big plus.

20 I think getting 40 million is a big plus. While you
21 said, your Honor, it was low hanging fruit, an easy case, I
22 suppose it could be low hanging fruit, but really low hanging
23 fruit at maybe \$20 million, something we rejected continuously
24 throughout this case, lower settlement offers. And at the end
25 of the day I think our perseverance and refusal to kind of cave

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1 probably about doubled the amount we got. And that's a huge
2 point. I think that is probably, number one, emphasizing why,
3 you know, a fee request that we're asking for is reasonable.

4 There was clearly money available, but I don't know
5 how to explain the dynamics here, were quite problematic, you
6 know. As you saw from the submission, this mediation, you
7 know, was almost interminable. It was over a year, multiple in
8 person meetings and phone calls. And every call it was like,
9 there are other claimants out there and they're about to settle
10 and there's no money left and you guys better take it and, you
11 know, the 250 in policy year 2007 and '08 is down to -- well,
12 first it went down to like 150 and less, and then we knew the
13 Bernstein Litowitz, you know, the debt equity case was a big
14 player and they were going to get a chunk of it, and then -- so
15 there was now less than 50 less, and then they're telling us
16 there are still hundreds of millions of dollars, billions of
17 dollars of claims left; if you guys don't accept it, you're
18 dead, you can get zero.

19 At the end of the day, you know, we just held off for
20 the higher number, and eventually we knew if we did make a
21 deal, we'd get zero, and, you know, then we would have to play
22 out for years the issue of the second policy, and whether we
23 ever could collect from the second policy, which the defendants
24 said did not apply to our case because of the interrelated acts
25 doctrine. And they said, you'll never be able to -- first of

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1 all, you can't pursue a declaratory judgment action to start
2 it. It has to be brought by the insureds. They're not going
3 to do it. Arguably, they can't even do it unless you get a
4 judgment in your case. You have to litigate your case first
5 and get a judgment for the second policy to come into play at
6 all, at least to have the discussion on it. And we thought
7 that was a little crazy. But a Judge in California in the
8 IndyMac case ruled exactly that way, that it was premature for
9 anyone to bring any kind of declaratory judgment action on
10 whether the second policy would apply in a case like this.

11 So we had, you know, these dynamics that were all
12 working against us, and there was this enormous pressure to
13 settle early and settle cheaply. And, you know, we just kind
14 of hung in there. And I think -- and, again, I am estimating
15 that we probably got close to double that some other firm might
16 have gotten in this case. Yes, that increased our lodestar,
17 but not to a massive extent.

18 I got another point, your Honor, it just slipped my
19 mind, which I think is very important.

20 And again risks -- and again when you say easy case, I
21 mean, you know, obviously the challenges here. Some of these
22 cases have been dismissed. Your Honor's ruling was one of the
23 first, maybe the first to sustain one -- I can't recall right
24 now -- on the underwriting guidelines. But some of them have
25 not survived. Obviously, we've been beaten on some of them on

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1 tranche standing. Obviously, we've been beaten here in statute
2 of repose issues.

3 We also have the issues of actually loss causation
4 would have been a problem. There were lots and lots of
5 obstacles along the way. So, again, not an easy case I would
6 say. But, yes, given the posture we were in after winning the
7 motion to dismiss, we clearly were in a good posture to get a
8 result. Really the question came about as to what was going to
9 be that result in the circumstances here.

10 Another point, your Honor, I think that kind of
11 justifies the reasonableness of our request. I think if you --
12 I'm not sure how important it is, but I think it is relevant.
13 Look at this settlement versus the debt equity settlement in
14 this case. Now again, admittedly, they had other pockets to go
15 after, and they got, you know, whatever four, \$500 million from
16 underwriters. But they got -- and this dwindling policy, they
17 got \$90 million. Their damages were, we estimate, five and a
18 half times greater than our damages. At the end of the day
19 when you compare their 90 to our 40, it's two or whatever and a
20 quarter times, as opposed to what their damages were. So I
21 think again just it's -- I'm not sure it's apples to apples,
22 apples to oranges. But in terms of comparing how we did,
23 again, I think we hung out there, where probably all the people
24 on the defense side and where the money was, wanted, you know,
25 to nail us with, you know, these ten, 20, 50 different lawsuits

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1 out there. They wanted us to at a much lower level and felt we
2 should not be up where we were. And, you know, I think it was
3 only, again, through our effort to get us there.

4 So I think all of those circumstances, you know,
5 justify what I think is at the end of the day a 2.01 multiplier
6 in a case. And, again, if you take out the rating agencies
7 let's say 2.5 -- I didn't do the numbers, I'm estimating that.
8 Again, it's certainly within the realm of reason in these cases
9 and, you know, I think a justified fee. Because you certainly
10 know that there are cases -- these are not -- you know, there
11 are plenty of cases we're getting zero, and there are
12 mortgage-backed cases were going to get zero or God knows
13 negatives. I can think of a few right now that are ongoing
14 that were never getting near our lodestar. So I think getting
15 the 2.0 multiplier, 2.01 or even if it was 2.5 and evaluated
16 that way, is not an unreasonable number in light of the risks
17 of these types of cases. Thank you.

18 THE COURT: Okay.

19 MR. TOLL: Anything else you want me to address on
20 allocation?

21 THE COURT: Thank you, no.

22 Anybody else want to be heard on this?

23 MR. LEDLEY: Your Honor, we obviously take no position
24 on the fee award.

25 With respect to --

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1 THE COURT: No skin in the game, I know.

2 MR. LEDLEY: With respect to approval of the
3 settlement, it sounds like your Honor's leaning in that
4 direction, which we appreciate.

5 We request that your Honor make any order approving
6 the final settlement effective on August 2nd or after in order
7 to provide the full 90 days under CAFA. The CAFA notice was
8 sent out on May 4th to general counsel of the Securities and
9 Exchange Commission, and the Attorney General of all 50 states,
10 and that was May 4th. The full 90 days would bring you to
11 August 2nd.

12 THE COURT: Okay.

13 MR. LEDLEY: I approached plaintiffs' counsel about
14 that and they do not object.

15 THE COURT: Okay.

16 MR. LEDLEY: Thank you.

17 THE COURT: All right. Thank you very much.

18 The motion to approve the settlement is granted. I
19 intend to sign the proposed order that was submitted. It was
20 fair, reasonable and adequate. I think plaintiffs' counsel did
21 a nice job in the case, generally speaking; happy to have them
22 here.

23 As far as the legal fees, I'm going to award a little
24 more than I thought I was going to award. The fee award will
25 be \$5,157,602. That is about 1.35 times the lodestar, taking

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1 the lodestar at the measure suggested by plaintiffs' counsel.
2 If I were to discount the lodestar for what plaintiffs' counsel
3 guesstimated as a half a million dollars spent ultimately on
4 successfully chasing the rating agencies, it would be a
5 multiplier of 1.5, and the multiplier would be even higher if
6 it were discounted even further for the rating agency piece of
7 this, which I never thought was a particularly sound part of
8 the case.

9 I'll let you all calculate what percentage of the
10 settlement fund the five million one is, but it's north of 12
11 and south of 19, that much we know, and it really -- it
12 represents an accommodation. I have always preferred to
13 approach this business of fee setting from the lodestar
14 perspective rather than the percentage. The second Circuit
15 still allows us to do that. Neither approach is, by any means,
16 problem free. I just think that I can reach a more principled
17 result from the lodestar than I can the other way. The other
18 way is kind of like in my mind, saying, well, you know,
19 somebody paid \$18,000 for a 2009 Honda Civic and, therefore,
20 the next transaction in the 2009 Honda Civic ought to be a
21 little higher. I mean, that's not a rationale to me. So it
22 just doesn't appeal to me. And I have some narrow scope of
23 discretion, so I'm going to exercise it.

24 Okay. Is there anything else I need to deal with?

25 MR. TOLL: Your Honor, the only thing is --

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1 THE COURT: Oh, expenses.

2 MR. TOLL: Yeah, the expense number.

3 THE COURT: Expenses. \$499,612.72.

4 MR. TOLL: Our supplemental submission indicated there
5 were two small items that came in later, so the total number
6 was \$501,807.72 is the final request.

7 THE COURT: Just out of curiosity, what came in late?

8 MR. TOLL: A bill from the mediator and a bill from --
9 \$800, and \$1300 bill from -- remind me -- oh, one of the
10 experts. Sorry.

11 THE COURT: Okay, I will approve the higher amount.

12 Thanks very much, folks. And that closes out this
13 case altogether, right? All right.

14 MR. TOLL: Yes. Thank you, Judge.

15 THE DEPUTY CLERK: All rise.

16 (Adjourned)

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